Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Tony Morgan,

Petitioner,

v.

Federal Home Loan Mortgage Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff in a Title VII and 42 U.S.C. § 1981 action, alleging unlawful discrimination, must express a continuing interest in a job even after being informed in writing that the job was filled in order to rebut a defendant's contention that it was unaware of the plaintiff's interest in the position.

2. Whether a Court can accept an employee's expression of interest in a position as meeting the requirements for establishing a prima facie case, and then reject that holding as not meeting the requirements for rebuttal of an employer's nondiscriminatory reason.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Morgan ("Morgan"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Morgan v. Federal Home Loan Mortg. Corp.*, 328 F. 3d 647 (D.C. Cir. 2003) and is reprinted in the Appendix A hereto at A-1. The opinion and order of the United States District Court for the District of Columbia granting respondent's motion to dismiss reported at *Morgan v. Federal Home Loan Mortgage Corp.*, 172 F.Supp. 2d 98, 108 (D.D.C. 2001) and is reprinted in the Appendix A hereto at A-2.

JURISDICTION

The district court had federal question jurisdiction over the plaintiff's claims under the Title VII of the Civil Rights Act of 1964 ("Title VII or "the Act") pursuant to 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to F.R.A.R. 4. The judgment of the court of appeals was entered on May 9, 2003. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATURORY PROVISIONS INVOLVED

Title VII's unlawful employment provision, § 2000e-2(a) of the Act, provides in pertinent part:

"unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race [or] color."

42 U.S.C. § 2000e-2(a).

Section 1981 prohibits racial discrimination in:

"the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

42 U.S.C. § 1981.

Title VII's unlawful retaliation provision § 2000e-3(a) of the Act, provides in pertinent part:

"an unlawful employment practice for an employer to discriminate against any . . . applicant [] for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerning discrimination.

42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

This is a case where a former employee brought Title VII and Section 1981 actions against his former employer for its refusal to consider his application for a position after the employee was subjected to a reduction in force. During the application process, the employer told Petitioner, "in writing", that the position he sought was already filled (J.A. at 249); discouraging the Petitioner's pursuit and without the employer providing similar notice to other applicants. Subsequently, the employer continued to take applications and ultimately offered the position, without advertising it, to a similar situated external candidate; not considering the Petitioner and not allowing the former employee to compete for the post.

In the decision below, the District of Columbia Circuit (D.C. Circuit) panel departed from the well settled understanding of Title VII, and Section 1981, and the rulings of the second, third, seventh, eighth and eleventh circuits. These rulings are that an applicant need only to express an interest in job to meet the "application" standards of *McDonnell Douglas*. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817. The D.C Circuit ruled, however, that an applicant is obligated to continue to pursue a job, even after the applicant has been told "in writing" that a position has been filled. The Court of Appeals' divergence from the well settled principles of other circuit courts creates a conflict. In addition, the decision is inconsistent with the intent of this Court's holding that a plaintiff's prima facie case can only be rejected for legitimate, nondiscriminatory reasons. *Texas Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 254 (1981). The D.C. Circuit said that Morgan had a prima facie case, but then accepted the employer's explanation that it was unaware of his interest as a defense. The court's logic is severely flawed. Moreover, the decision below will impose serious and unwarranted burdens, both on applicants for employment whose opportunities the Act was intended to secure and on employers who seek to extend those opportunities without subjecting themselves to protracted litigation. Review by this Court is necessary to avert the negative consequences of the D.C. Circuit's erroneous interpretation of Title VII and Section 1981.

I. Factual Background

Petitioner Tony Morgan, an African-American male, a graduate of Georgia Tech and the Wharton Business School, and former Chief Economist to former Senate Majority Leaders Senators George Mitchell and Thomas Daschle was employed as Director, Executive Corporate Relations at Federal Home Loan Mortgage Corporation ("Freddie Mac") from January 17, 1995 to March 31, 1996. His employment ended as a result of a reduction in force. In exchange for severance pay and other benefits, Morgan signed a release of all "claims arising out of or relating in one way to [his] employment relationship" prior to April 7, 1996, the effective date of the release. J.A. at 203-04. Before and after executing the release, the plaintiff applied for a number of other positions at Freddie Mac, but was unsuccessful in obtaining reemployment.

On December 11, 1996, Morgan filed a complaint with the Equal Employment Opportunity Commission (EEOC),

alleging, inter alia, that Freddie Mac's failure to rehire him was due to racial discrimination. After filing the complaint, Morgan submitted several additional, also unsuccessful, applications for employment with the corporation. On August 14, 1998, the EEOC issued a letter of Determination, inter alia, that Freddie Mac discriminated against African American employees.

II. Proceedings In the District Court

On June 3, 1998, Morgan filed suit against Freddie Mac and three of its officers in the United States District Court for the District of Columbia. The plaintiff alleged that Freddie Mac had refused to rehire him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and 42 U.S.C. § 1981. He also alleged, inter alia, that the refusal was in retaliation for his having pressed employment discrimination claims with the EEOC, in violation of Title VII, 42 U.S.C. § 2000e-3(a).

On November 9, 2000, the district court granted a motion to dismiss Morgan's claims against two of the three individual defendants. After extensive discovery, the remaining defendant, Freddie Mac and its Vice President, Mitchell Delk, moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. By that point, the plaintiff had narrowed his claims to discrimination and retaliation in Freddie Mac's failure to offer him eight positions. On October 23, 2001, the district court granted the defendants' summary judgment motion regarding four of those jobs because Morgan had been rejected for them prior to the effective date of the 1996 release of claims. *Morgan v.*

Federal Home Loan Mortgage Corp., 172 F.Supp. 2d 98, 108 (D.D.C. 2001). As to the claims relating to the four remaining positions, the court also granted summary judgment on the grounds that Morgan had failed to establish a prima facie case of discrimination or retaliation. *Morgan,* 328 F. 3d at 650.

III. Proceedings In the Court of Appeals

On November 15, 2001, Morgan filed a timely appeal pursuant to Federal Rule of Civil Procedure 34 (j) for the latter four positions at issue in the United States Court of Appeals for the District of Columbia on the grounds that the district court failed to draw all reasonable inferences in favor of the nonmoving party and instead, made factual findings on disputed issues. As a result, the court the concluded that Morgan did not establish a prima facie case of discrimination and retaliation for the positions sought.

On October 10, 2002, the case was argued before a three-judge panel and decided on May 9, 2003. The Court of Appeals affirmed the district court's decision, holding that Morgan's claims that Freddie Mac unlawfully rejected him for three positions failed because he could not demonstrate that his rejection did not result from legitimate reasons. *Morgan,* 328 F. 3d at 647.

The basis for the Petitioner's Writ of Certiorari is regarding the fourth and final position, Director of Issues Management, July 1997. *Morgan,* 328 F. 3d at 653-655. The panel concluded, contrary to the district court, inter alia, that Morgan had established a prima facie case, but that he failed

to rebut that the corporation's non-discriminatory explanation for not offering him the post was pretextual or from which a reasonable jury could conclude that he was not hired because of racial discrimination or retaliation. The Court of Appeals noted that "Morgan's prima facie case regarding this claim does not suffer from the defects that we have identified with respect to the July 1997 positions." *Morgan,* 328 F. 3d at 653. As a result, the Court of Appeals panel narrowed the case and based its decision on a single issue, ". . . namely, that [Freddie Mac] was unaware that he was still interested [in the position]."[1] *Morgan,* 328 F. 3d at 654.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Review Is Warranted Because The D.C. Circuit's Decision Is Inconsistent With Rulings of Second, Third, Seventh, Eighth, and Eleventh Circuits.

The D.C. Circuit erred in holding that an employer was unaware of an applicant's interest in a position where the employee submitted a resume for the same position four months prior to the selection. Other circuit courts have consistently held that an applicant need not apply for a position or express a continuing interest in a job to prove that the employer is aware of his interest. Thus, the decision below simply cannot be reconciled with the weigh of authority regarding the application

[1] On July 18, 1997 Freddie Mac sent a letter to Morgan advising him that the position had been filled. (J.A. at 289).

requirement. Because of the lower courts' divergent opinions on this issue, the writ should be granted.

The well settled principle that an applicant need not always apply for a job to prove the employer is aware of their interest typically applies to establishing a prima facie case under Title VII. However, it equally applies as a basis to refute the employer's non-discriminatory reason for its decision after a plaintiff has established a prima facie case under the McDonnell Douglas framework. The opinion below flies in the face of well established precedent. Essentially, the court below overruled the Federal district court, in part, by holding that the applicant had a prima facie case, but then concluded in the same breath that he offered no evidence to rebut the employer's non-discriminatory explanation. This conclusion is flawed. *McDonnell Douglas*, 411 U.S. 802. Under McDonnell Douglas, in order to establish a prima facie case of discrimination, the plaintiff must prove the following:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualification. *McDonnell Douglas*, 411 U.S. 802.

Thus, as a matter of law, the D.C. Circuit's decision, acknowledging that plaintiff had a prima facie case is

nothing short of a finding that the employee did indeed "apply" for the job, and therefore the employer was ultimately aware of the applicant's interest. The decision of the lower court simply ignores the fundamental principle that the plaintiff had established a requisite element of a prima facie case– the expression of an interest in a position with the employer. To acknowledge that the employee met the application requirement of a prima facie case and then ignore that very same fact after the burden has shifted back to the employee, turns prior case law on its head and leads to an absurd conclusion.

Now, under the D.C. circuit court's ruling, a plaintiff must show a continuing interest in a position or somehow divine the fact that the job is available even when it is not advertised.

Indeed, in *Holsey v. Armour & Co.*, 743 F.2d. 199, 208-09 (4th Cir. 1984), the fourth circuit held that where an employee was never asked to complete an application, casual interest in the possibility of promotion to a sales job was sufficient to constitute notice of an application for a position. Similarly, in *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 568 (8th Cir. 1982), where a vacancy for a bank job was not posted and the applicant did not learn about it until the position was filled, expression of a general desire to advance in the bank was sufficient to put an employer on notice of the applicant's interest.

Even where an applicant expresses an interest in other jobs, an applicant's generalized interest can be considered an application for a position. Thus, in *Harris v. Birmingham Bd. of Educ.*, 712 F.2d. 1377, 1383 (11th Cir. 1983), the eleventh circuit held that where an applicant generally made its interest known in jobs as foremen, the court did not require them to reapply every time a new foremen job became available at the same time when the employer was considering applicants for the job. Finally, the seventh circuit held that where job vacancies were neither posted nor advertised, an applicants' generalized expression can be considered an application even though communicated interest was actually for another job. *Box v. A & P Tea Co.*, 772 f.2d. 1372, 1376-77 (7th Cir. 1985). The above line of cases leads to the inescapable conclusion that a jury may infer that an applicant's past expression of interest in a position may refute an employer's non-discriminatory reason for not selecting the applicant. The D.C. Circuits decision is directly in conflict with these decisions. Under the D.C. Circuit's logic, an applicant would have to express a continuing interest in a position, even after being informed four months earlier that the position was filled.

II. Review Is Warranted Because The D.C. Circuit's Decision Is Inconsistent With Its Prior Rulings.

In *Cones v. Shalala*, 199 F.3d 512, 518 (D.C. Cir. 2000), an applicant for a promotion to a Director's position at the Department of Health and Human

Services expressed his interest in a position to the same government official as the successful applicant, but the successful applicant merely transferred into the job because the employer never opened it to competition. Thus, the employer claimed that the plaintiff never "applied" for the job, and therefore did not satisfy all the elements of a prima facie case. In holding that Cones "applied" for the position, the district court stated that Cones established that the employer was aware of his interest based on the fact that he in effect applied in the same manner as the successful applicant. Both informed a senior manager in the department that they were interested in the promotion. The Petitioner falls squarely in this category. After all, Morgan and the successful applicant both submitted an expression of interest to the employer in July 1997 for the position at issue. *Morgan*, 328 F. 3d at 654. But, because Morgan was informed in writing that the job was filled, he did not pursue the job any further. Under Cones, Morgan has done all that is necessary to express an interest in a position. Simply put, he applied in the same manner as the successful candidate. Remarkably, the D.C. Circuit ignores this key fact that satisfies the requirements of Cones.

The ruling below, is at odds with the principle enunciated in Cones and therefore establishes a new standard for Title VII and Section 1981 cases in the D.C. Circuit. The new precedent is that an applicant must continue to pursue a job after he has been informed that the job is no longer available in order to prove pretext and therefore, intentional discrimination.

III. The Ruling Below Creates A Loophole In Title VII And Places New Burdens On Applicants.

The D.C Circuit's new standard creates a major loophole in Title VII and Section 1981, and allow employers to ignore applications from protected classes. Thus, employers need only state that they were unaware of an applicant's interest to skirt Title VII and Section 1981 liability. It places substantial new burdens and establish employment practices that would derail current recruitment, retention, promotion and hiring policies. The D.C. Circuit's requirement to make applicants expend resources when the selection process has already been completed makes no practical sense. It creates an endless process for applicants, that must continue to pursue nonexistent opportunities, and employers that must respond to the applicants even after it has completed recruitment. The ruling below has substantial unintended consequences that undermine Title VII and Section 1981.

IV. The Ruling Below Is Inconsistent With Congress' Purpose and Intent In Establishing Title VII.

In drafting Title VII and Section 1981, Congress intended on extending this founding principle to the area of employment. Specifically, Congress' primary "purpose. . .is . . . to eliminate. . . discrimination in employment based on race. . .", H.Rep.No. 914, (1964), *reprinted in* 1964 U.S.C.C.A.N. 2401.

The D.C. Circuit's holding that an employer can discourage a single applicant from pursuing a job without providing similar notification to other applicants while allowing that employer to use the results of the discouragement as a defense is impossible to reconcile case with Congress' purpose and intent of passing the Act.[2] The court in effect permits an employer to offer the same nondiscriminatory reason, which has already been rejected as a defense to a prima facie case.

Under the standards that have been established by other circuits (See *Box,* 772 f.2d. at 1372; *Cones,* 199 F.3d at 512; *Harris,* 712 F.2d. at 1377; *Holsev*, 743 F.2d. at 199; *Paxton,* 688 F.2d at 552), that equal consideration, therefore Title VII protection, should be given to those that have expressed an interest in a job. In this case, other applicants should have been given the same notice that Morgan received, i.e., that the job was filled.[3] By not providing similar notice to other applicants, the employer eliminated the Petitioner's Title VII protection as cited by Congress and the guise which Titled VII and Section 1981 was created. The legislative history and the backdrop against which Congress' passed Title VII and Section 1981 removes any possible doubt on this score. Thus, the D.C.

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[2] The Court of Appeals panel narrowed the case and based its decision on a single issue, ". . . namely, that [Freddie Mac] was unaware that he was still interested [in the position]." *Morgan,* 328 F. 3d at 654.

[3] See Footnote 1., herein.

Circuit's ruling creates a situation where an employer may now can ignore prior applications or expressions of interest and escape Title VII liability and the Congressional objective of the Act. The D.C. Circuit gave no weight to the Congressional intent and compels the conclusion that they misconstrued the statue and disregarded the Congressional purpose that underlies Title VII and Section 1981.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX A1: Opinion of the United States Court of Appeals, filed May 9, 2003

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 10, 2002 Decided May 9, 2003

No. 01-5403

TONY MORGAN,
APPELLANT

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION AND
MITCHELL DELK,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 98cv01397)

David A. Branch argued the cause and filed the briefs for appellant.

Nancy R. Kuhn argued the cause for appellees. With her on the brief were *Diane Marshall Ennist* and *Kathy B. Houlihan*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: SENTELLE, ROGERS, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The plaintiff in this case brought suit against the Federal Home Loan Mortgage Corporation and one of its officers, alleging that the corporation failed to hire him for any of several positions because of his race and in retaliation for his having filed a discrimination complaint with the Equal Employment Opportunity Commission. The district court granted the defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, and we affirm.

I

Plaintiff Tony Morgan, an African–American male, was employed as Director, Executive Corporate Relations at the Federal Home Loan Mortgage Corporation ("Freddie Mac") from January 17, 1995 to March 31, 1996. His employment ended as a result of a reduction in force. In exchange for six months of severance pay and other benefits, Morgan signed a release of all "claims arising out of or relating in any way to [his] employment relationship" prior to April 7, 1996, the effective date of the release. J.A. at 203–04. Before and after executing the release, the plaintiff applied for a number of other positions at Freddie Mac, but was unsuccessful in obtaining reemployment.

On December 11, 1996, Morgan filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging, inter alia, that Freddie Mac's failure to rehire him was due to racial discrimination. After filing the complaint, Morgan submitted several additional, also unsuccessful, applications for employment with the corporation.

On June 3, 1998, Morgan filed suit against Freddie Mac and three of its officers in the United States District Court for the District of Columbia. The plaintiff alleged that Freddie Mac had refused to rehire him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), and 42 U.S.C. § 1981. He also alleged, inter

alia, that the refusal was in retaliation for his having pressed employment discrimination claims with the EEOC, in violation of Title VII, 42 U.S.C. § 2000e–3(a).[1]

On November 9, 2000, the district court granted a motion to dismiss Morgan's claims against two of the three individual defendants. After extensive discovery, the remaining defendants, Freddie Mac and its Vice President, Mitchell Delk, moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. By that point, the plaintiff had narrowed his claims to discrimination and retaliation in Freddie Mac's failure to offer him eight positions. The district court granted the defendants' summary judgment motion regarding four of those jobs because Morgan had been rejected for them prior to the effective date of the 1996 release of claims. *Morgan v. Federal Home Loan Mortgage Corp.*, 172 F. Supp. 2d 98, 108 (D.D.C. 2001). As to the claims relating to the four remaining positions, the court granted summary judgment on the ground that Morgan had failed to establish a prima facie case of discrimination or retaliation. *Id.* Only the latter four positions are at issue on this appeal.

II

We review the district court's grant of summary judgment de novo. *Waterhouse v. District of Columbia*, 298 F.3d 989, 991 (D.C. Cir. 2002). Such a grant is appropriate if " 'there is no genuine issue as to any material fact and . . . the moving

[1] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race [or] color." 42 U.S.C. § 2000e–2(a). Section 1981 prohibits racial discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981. Title VII also makes it "an unlawful employment practice for an employer to discriminate against any . . . applicant[ ] for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerning employment discrimination. 42 U.S.C. § 2000e–3(a).

party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). A dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *id.* at 248, and a moving party is "entitled to a judgment as a matter of law" if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Because Morgan has no direct evidence that Freddie Mac refused to hire him for any of the positions on account of his race, we analyze those claims under the familiar framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). *See also Carter v. Duncan–Huggins, Ltd.*, 727 F.2d 1225, 1232 (D.C. Cir. 1984) (applying the *McDonnell Douglas* framework to § 1981 claims). Under that framework, "the plaintiff must [first] establish a prima facie case of discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). The plaintiff can satisfy that initial burden by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802. As the Supreme Court has explained, this framework "demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

If the plaintiff establishes his prima facie case, the defendant then bears the burden of " 'produc[ing] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.' " *Reeves*, 530 U.S. at 142 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450

U.S. 248, 254 (1981)). If the defendant produces such evidence, "the *McDonnell Douglas* framework — with its presumptions and burdens — disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Id.* at 142–43 (internal quotation marks and citations omitted). At that point, to "survive summary judgment the plaintiff must show that a reasonable jury could conclude that [he] was [rejected] for a discriminatory reason." *Waterhouse*, 298 F.3d at 992 (citing *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998)). Although the *McDonnell Douglas* framework shifts "intermediate evidentiary burdens" between the parties, " '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253).

This framework also governs our analysis of Morgan's claims of unlawful retaliation in violation of 42 U.S.C. § 2000e–3(a). *See Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985); *Williams v. Boorstin*, 663 F.2d 109, 116 (D.C. Cir. 1980). The only difference is the phrasing of the prima facie case: "In order to establish a prima facie case of retaliation, a plaintiff must show: 1) that [he] engaged in a statutorily protected activity; 2) that the employer took an adverse personnel action; and 3) that a causal connection existed between the two." *Mitchell*, 759 F.2d at 86 (internal quotation marks omitted). Where, as here, the plaintiff claims that the retaliation took the form of a failure to hire, the plaintiff must also show: 4) that he applied for an available job; and 5) that he was qualified for that position. *Id.* at 86 n.5; *Williams*, 663 F.2d at 116 & n.43.

III

On appeal, Morgan has confined his claims to Freddie Mac's allegedly unlawful failure to offer him four positions for which Morgan applied after the period covered by his 1996 release. We consider the first three of those positions in this Part, and conclude that Morgan failed to make out a prima

facie case of discrimination or retaliation as to any of them. We consider the fourth position in Part IV below.

In letters dated July 3, 1997, Morgan applied for three jobs previously posted by Freddie Mac: 1) Director, Business Support; 2) Director, Business Strategies; and 3) Director, Issues Management. With respect to his application for the first of these — Director, Business Support — Freddie Mac responded with a letter advising Morgan that the position was currently on hold and that the corporation had stopped all recruitment. Clarke Letter (July 18, 1997) (J.A. at 289). In support of its motion for summary judgment, Freddie Mac proffered evidence that it had suspended recruitment for the position a month before Morgan applied, and that it was never filled. Gertz E-mail Messages (June 6, 1997) (J.A. at 553–56); Clarke Decl. at ¶ 5 (J.A. at 550).

Morgan offered no evidence to rebut the corporation's assertion that it had suspended recruitment for the Business Support directorship before he applied. He did dispute the contention that Freddie Mac never filled the position, noting that in the fall of 1997, a woman named Ann Herrington was interviewed for and in 1998 accepted a job, entitled "Director, Strategic Planning," in the same department. But the plaintiff offered no evidence to contradict the corporation's proof that this was a completely different position, other than to point to the fact that the job description for Director, Business Support included the term "strategic planning" in the list of critical skills and experience needed for the position — albeit *not* in the list of the position's responsibilities. J.A. at 284–85. Having thus failed to raise a genuine issue that the Business Support position for which he applied was one "for which the employer was seeking applicants," *McDonnell Douglas*, 411 U.S. at 802, Morgan failed to establish a prima facie case of either discrimination or retaliation, and summary judgment on this claim was therefore appropriate. *See International Bhd. of Teamsters*, 431 U.S. at 358 n.44; *Williams*, 663 F.2d at 116 n.43.

The second position for which Morgan applied on July 3, 1997, was entitled "Director, Business Strategies." In its

letter responding to Morgan's application, Freddie Mac advised that the job was open only to internal candidates. Morrow Letter (July 18, 1997) (J.A. at 290). Morgan does not argue, and there is no evidence to suggest, that this qualification was other than bona fide or that the corporation imposed it as a means of excluding Morgan or other minority applicants from consideration. Indeed, the requirement that candidates come from within the company was contained in the corporation's original notice of availability, which was posted two months before Morgan applied. J.A. at 395.

Morgan does contend that, despite the stated qualification, Freddie Mac did not limit its consideration to internal candidates. There is no evidence, however, to support this claim. Morgan points to a "resume distribution" cover sheet, which shows that on May 1, 1997, the corporation's human resources department forwarded an external candidate's résumé to Vice President Delk, the hiring manager for the Business Strategies position (as well as for other jobs not at issue here). *See* J.A. at 315. But that résumé was received and forwarded *before* the Business Strategies position was posted, *compare id.* at 315, *with id.* at 395; the external applicant did not apply for any specific position, *see id.* at 315, 317; and the résumé was not forwarded to Delk with reference to any particular job opening, *see id.* at 315. Moreover, Delk responded that he was not interested, *see id.*, and the only other person Morgan contends Freddie Mac considered for the position, a lawyer in its legal division, plainly was an internal candidate. *See id.* at 352, 428–29.[2] Because Morgan thus provided no evidence that he met a bona fide qualification for the Business Strategies position, he failed to establish a prima facie case of discrimination or retaliation, and summary judgment was again appropriate. *See International Bhd. of Teamsters*, 431 U.S. at 358 n.44; *Mitchell*, 759 F.2d at 86 n.5; *Williams*, 663 F.2d at 116 & n.41.

The final position for which Morgan applied on July 3, 1997, was that of Director, Issues Management. In response,

[2] The position of Director, Business Strategies was never filled and was ultimately cancelled. Delk Dep. at 33 (J.A. at 351).

Freddie Mac told Morgan that the hiring decision had already been made. *See* Morrow Letter (J.A. at 290). In support of its motion for summary judgment, the corporation offered the testimony of the hiring manager for that job, Ann Schnare, who averred that she had filled the post by making two hires (one part-time, one full-time) in June, before Morgan applied. J.A. at 195. (The vacancy announcement had been published two months earlier, in April 1997. *Id.* at 397.) Morgan's principal response is to cite a letter from Schnare to one of those individuals, Susan Gates, that was dated July 14, 1997. *Id.* at 325. Contrary to Morgan's contention, however, the letter does not offer Gates the position, but rather confirms the corporation's earlier "offer and your [Gates'] acceptance." *Id.* The letter is thus consistent with Schnare's testimony that the offer and acceptance took place in June, and Morgan offers nothing to call that testimony into question.[3] Accordingly, the plaintiff has for a third time failed to establish a critical element of a prima facie case of discrimination or retaliation: the existence of a vacancy in the position for which he applied. *See International Bhd. of Teamsters*, 431 U.S. at 358 n.44; *Williams*, 663 F.2d at 116 n.43.

IV

In November 1997, the position of Director, Issues Management once again became open.[4] In December, without advertising the job, Freddie Mac offered it to Ann Herrington, a white female who was working at the General Electric

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[3] Morgan also contends that Freddie Mac continued to seek applicants for the Issues Management position after Morgan submitted his application, citing an application that Ann Herrington submitted on July 14, 1997. J.A. at 320. But that document establishes nothing more than that Morgan was not the only person who applied for the opening after it was filled.

[4] Freddie Mac explained that the job became available because Gates, the part-time incumbent, had become responsible for writing speeches for Freddie Mac's corporate communications group and was no longer able to fulfill her Issues Management responsibilities. Schnare Decl. ¶¶ 5–7 (J.A. at 569–70).

Company at the time. Herrington turned the offer down (accepting a different position instead), and Freddie Mac ultimately eliminated the office altogether as part of a reorganization the following March.[5] Morgan points out that both he and Herrington originally applied for the Issues Management job at the same time, in July 1997,[6] and contends that Freddie Mac's failure to offer him the position that December constituted unlawful discrimination and retaliation.[7]

Because there was a vacancy at the time Freddie Mac made the offer to Herrington, and because Herrington was herself an external candidate, Morgan's prima facie case regarding this claim does not suffer from the defects that we have identified with respect to the July 1997 positions. Although Freddie Mac contends that there are other problems with Morgan's prima facie case concerning the November 1997 opening, we need not resolve that dispute because the corporation also proffered a nondiscriminatory reason for not considering Morgan at that time: namely, that it was unaware that he was still interested. As the Supreme Court has made clear, once a defendant has proffered such a nondiscriminatory explanation, it has "done everything that would be required of [it] if the plaintiff had properly made out a prima facie case." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). At that point, "whether the plaintiff really did so is no longer relevant," and the only question is "whether 'the defendant intentionally discriminated against the plaintiff.' " *Id.* at 715 (quoting *Burdine*, 450 U.S. at 253); *see Waterhouse*, 298 F.3d at 993 n.6. On that question, Morgan bears the " 'burden of showing that a reasonable jury could conclude' " that Freddie Mac failed to offer him the position out of discriminatory or

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[5] The plaintiff does not assert that the cancellation of the position was due to discriminatory or retaliatory animus.

[6] *See supra* note 3.

[7] Morgan describes the Issues Management directorship as a single position, for which he was twice rejected. Freddie Mac contends that there were two separate positions. In our view, nothing turns on this distinction.

retaliatory animus. *Waterhouse*, 298 F.3d at 993 (quoting *Aka*, 156 F.3d at 1290).

Morgan has failed to satisfy that burden. Freddie Mac explained that, although both Morgan and Herrington initially applied for the Issues Management directorship in July 1997, the corporation was not aware that Morgan remained interested after he was informed in mid–July that the position had been filled. Herrington, by contrast, repeatedly expressed her interest later that fall. Thus, when the position again became available in November, the corporation knew that Herrington was interested but did not know that Morgan was. Schnare Dep. at 60–62 (J.A. at 196, 533–34). A plaintiff may, of course, "attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 256). But in the district court the plaintiff offered no evidence to rebut Freddie Mac's contention that it was unaware of his interest in late 1997, and his appellate briefs do not even allege that this contention was false.[8]

In addition to showing that an employer's proffered explanation is unworthy of belief, a plaintiff may submit other evidence of the employer's unlawful animus in a bid to avoid summary judgment. *See Reeves*, 530 U.S. at 148–49; *Burdine*, 450 U.S. at 256; *Aka*, 156 F.3d at 1289.[9] Although

[8] At oral argument, Morgan did contend that he had in fact made his interest known in the fall of 1997. But he offered no evidentiary support for that assertion, and appellate argument is in any event too late in the proceedings to controvert the issue. *See Frito–Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1036 (D.C. Cir. 1988) (holding that in reviewing summary judgment, the court of appeals' "sole and limited task is to assess with care the record before the District Court at the time it granted [the motion]," and may not consider evidence proffered for the first time on appeal (internal quotation marks omitted)).

[9] A plaintiff may also rely on the evidence used to establish his prima facie case. *See Reeves*, 530 U.S. at 143; *Waterhouse*, 298 F.3d at 992–93; *Aka*, 156 F.3d at 1289. Here, however, Morgan

Morgan does not frame the argument in this way, we have considered the only two pieces of evidence that might be relevant in this regard. First, Morgan's brief alludes to a racially degrading e-mail sent out by a single Freddie Mac employee. But Morgan does not allege that the offending employee had any role whatsoever in deciding whether to hire him. *See Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077, 1079–80 (D.C. Cir. 1999) (holding that evidence of a discriminatory statement by an individual uninvolved in the challenged employment decision is insufficient to defeat summary judgment). Second, Morgan notes that, in response to his EEOC complaint, the Commission issued a determination of reasonable cause to believe that Freddie Mac had discriminated against him. J.A. at 280–82; *see* 42 U.S.C. 2000e–5(b) (requiring the Commission to determine whether "there is reasonable cause to believe that [an unlawful employment practice] charge is true"). But the EEOC determination does not indicate whether it covers Morgan's claim regarding the November 1997 Issues Management position, and it is doubtful that it does since Morgan last filed EEOC charges in April 1997, *see* Appellant's Br. at 25, well before he applied for any of the openings at issue on this appeal. Moreover, the determination's conclusory sentences are insufficient, standing alone against Freddie Mac's unrebutted nondiscriminatory explanation, to satisfy Morgan's "burden of showing that a reasonable jury could conclude" that he was not offered the Issues Management position on account of his race or discrimination complaint, *Aka*, 156 F.3d at 1290. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283–84 (9th Cir. 2000); *Goldberg v. B. Greene & Co.*, 836 F.2d 845, 848 (4th Cir. 1988).[10]

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presented (at best) a bare bones prima facie case that alone could not constitute "sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision" or "to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 140, 148.

[10] Moreover, the Statement of Genuine Issues filed by Morgan in the district court cited the EEOC letter only in support of his separate claim that Freddie Mac had created a hostile work envi-

V

Morgan's claims that Freddie Mac unlawfully rejected him for three positions in July 1997 fail because he cannot "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *International Bhd. of Teamsters*, 431 U.S. at 358 n.44. His contention that Freddie Mac unlawfully failed to offer him a position in late 1997 founders upon his failure to provide any evidence that the corporation's lawful explanation for not offering him the post was false, or any other evidence from which a reasonable jury could conclude that he was not hired because of racial discrimination or retaliation. Accordingly, the district court properly granted defendants' motion for summary judgment, and the decision of that court is therefore

Affirmed.

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ronment, a claim that plaintiff has not raised on this appeal. J.A. at 380–81.

APPENDIX A2: Memorandum Opinion of the United States District Court, filed October 23, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TONY MORGAN,	
Plaintiff,	
v.	**Civil Action No. 98-01397 (ESH)**
FEDERAL HOME LOAN MORTGAGE, *et al.,*	**Filed October 23, 2001**
Defendants.	

MEMORANDUM OPINION

Plaintiff Tony Morgan, a black male, was employed by Federal Loan Home Mortgage Corporation ("Freddie Mac") From January 1995 to March 1996. In anticipation of and after his termination on March 31, 1996, plaintiff applied for a number of positions with Freddie Mac but was not hired. On June 3, 1998, plaintiff filed a complaint, alleging discrimination and retaliatory refusals to hire in violation of Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981, and the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.* ("DCHRA"). Defendant have moved for summary judgment on the grounds that, inter alia, the

DCHRA claims are time-barred; plaintiff released any claims arising prior to April 7, 1996; and plaintiff has failed to present sufficient facts to establish a prima facie case of discrimination or retaliation. As explained more fully below, this Court concludes that defendants' motion should be granted.

BACKGROUND

Plaintiff was employed as Director, Corporate Relations-Executive by Freddie Mac at its McLean, Virginia headquarters from January 17, 1995 to March 31, 1996. Freddie Mac terminated his employment on March 31, as a result of a reduction-in-force. In exchange for six additional months of severance pay and outplacement assistance, plaintiff executed a "Release of All Claims," effective April 7, 1996 (the "Release"). Prior to and after executing the Release, plaintiff expressed interest in and applied for a number of positions at Freddie Mac, but was unsuccessful in his attempts to obtain re-employment.

Based on these refusals to hire, on December 11, 1996, plaintiff cross-filed discrimination complaints with the Fairfax County Human Rights Commission and the Equal Opportunity Commission ("EEOC"). Plaintiff's EEOC complaint alleged racial discrimination in his non-selection for the position of Director, Government Relations and Director, Industry Relations. After filing these complaints, plaintiff applied for a number of additional positions at Freddie Mac, but was not offered employment.

On June 3, 1998, plaintiff brought a class action lawsuit alleging, inter alia, harassment based on race and discrimination and retaliatory refusal to hire under Title VII, Section 1981, and the DCHRA. The case was originally assigned to the Honorable Thomas Penfield Jackson. After months of discovery regarding the class claims, a statement was filed on February 1, 1999, indicating that "plaintiff's counsel have determine not to proceed at this time with

moving to certify a class under Rule 23. . . ." Thereafter, the case was reassigned to the undersigned. On November 9, 2000, this Court granted defendants' motion to dismiss the counts against defendants Leland Brendsel and John Gibbons. Following many months of protracted discovery disputes, which were ably managed by Magistrate Judge John Facciola, plaintiff's counsel moved to withdraw based on irreconcilable differences with the plaintiff. This motion was ultimately granted on January 25, 2001. This withdrawal necessitated further delays in discovery so as to permit plaintiff to find new counsel. With the appearance of new counsel, discovery was finally completed and the case is now ripe for summary judgment consideration.

Despite this tortured history, the issues have now been narrowed considerably. As noted, there are no class claims. There is no issue as to the validity (as opposed to the interpretation) of the Release signed by the plaintiff, and thus, plaintiff's claims as to discrimination and harassment during his tenure at Freddie Mac are no longer at issue. Two of the three individual defendants have been dismissed, and plaintiff has conceded that he is no longer pursuing any claims regarding his nonselection for seven out of the fifteen positions that had been included in his complaint.[1/]

[1/] Plaintiff no longer claims discrimination or retaliation with respect to his non-selection for the following positions: Director, Expanding Markets, and international position, Account Executive, Director, Industry Relations (1997), Director, Financial Engineering, Director, Derivatives Management, Director, Securities Marketing (1998). (Plaintiff's Opposition and Memorandum in Support of Opposition to Defendants' Motion for Summary Judgment, at 1, n.1) (hereinafter "Pl.'s Opp.")

Left for consideration are claims relating to eight positions, four of which plaintiff applied for but was rejected prior to signing a Release. The only remaining defendants are Freddie Mac and Vice President of Government and Industry Relations, Mitchell Delk. The legal claims include discriminatory refusal to hire on the basis of race and political affiliation and retaliation in violation of Title VII (Count I), Section 1981 (Count II) and the DCHRA (Count III).

Defendants have moved for summary judgment on all remaining claims on the grounds that: (1) plaintiff's DCHRA claims are time-barred; (2) the Release bars those claims concerning non-selections occurring prior to April 7, 1996; and (3) plaintiff has failed to establish a prima facie case of discrimination or retaliation on the grounds that the positions at issue were either not available, were never filled, or plaintiff lacked the necessary qualifications for the position.

ANALYSIS

I. Summary Judgment

Under Fed. R. Civ. P. 56, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. At 255; see also Washington Post Co. v.

United States Dep't of Health and Human Servs., 865 F.2d. 320, 325 (D.C. Cir 1989).

The nonmovant's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trail. Fed R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The nonmovant must provide evidence that would permit a reasonable jury to find in his favor. Laningham v. United States Navy, 813 F. 2d 1236, 1241 (D.C. Cir. 1987). "If the evidence is mere colorable, or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted). "While summary judgment must be approached with special caution in discrimination cases, a plaintiff is not relieved of [his] obligation to support [his] allegations by affidavits or other competent evidence showing that there is a genuine issue for trail." Calhoun v Johnson, 1998 WL 164780 at *3 (D.D.C. March 31, 1998), aff'd, 1999 WL 825425 (D.C. Cir Sept. 27, 1999) (citation omitted). In addition, Local Civil Rule 7.1(h) provides that "[a]n opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the part of the record relied on to support the statement."

Despite the principles of law and the requirements of the local rules, "Plaintiff's Statement of Genuine Issues in

Dispute" (hereinafter "Plaintiff's Statement") is woefully deficient in many respects. Plaintiff's Statement fails to controvert most of the facts set forth by defendants, including material facts relating to the nonavailability of positions for which plaintiff applied and was refused employment[2]/

Under Rule 7.1(h), " the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in ht statement of genuine issues filed in opposition to the motion." Even where facts are disputed, a careful review of the record citations reveals that there is a lack of support for plaintiff's assertions.[3]/ Plaintiff's Statement is also deficient insofar as reference is made to alleged facts for which a deposition is cited without any specific page

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[2]/ For example, regarding plaintiff's nonselection as Director, Industry Relations, plaintiff provides no evidence to contest defendants' assertion that a vacancy for the position was never posted and that the functions of the position were transferred out of Mitchell Delk's department (Defs.' Statement ¶¶ 35-36); regarding the Director, Government Relations position, plaintiff does not dispute defendants' assertion that there was no vacancy when plaintiff discussed the position with Delk (Id. at ¶¶ 40-41); and regarding the Director, Business Support position, plaintiff does not dispute that the hiring manager suspended recruitment for the position before plaintiff applied. (Id. ¶ 143).

[3]/ For example, plaintiff claims that the position Director, Business Support, "could very well" have been renamed Director, Strategic Planning and offered to another candidate. (Pl.'s Opp. at 32.) However, a review of the Freddie Mac documents and deposition statements that plaintiff cites, reveals that his claim rests not on evidence, but on pure conjecture. See pp. 14-15, infra.

reference.[4]/ The burden is on the parties, not the court, to "identify the pertinent parts of the record, to isolate the facts that are deemed to be material, and to distinguish those facts which are disputed from those that are undisputed." Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988), cert. denied, 490 U.S. 1066 (1989); see also Jackson v. Finnegan, Henderson, Farabow, Garrett, & Dunner, 101 F.3d. 145, 153 (D.C. Cir. 1996) (noting that the burden is in counsel, not the court, to "winnow the wheat from the chaff"). Furthermore, in support of his Statement, plaintiff often relies on his own self-serving Declaration, much of which is peppered with conclusory statements regarding his superior qualifications.[5]/

As explained more fully below, when the uncontroverted evidence is considered, it becomes readily apparent that plaintiff's DCHRA claims are timed barred, he has released any possible claim as to four of the positions at issue, since the refusal to hire occurred prior to the effective date of the Release, and, as to the remaining positions, he cannot establish a prima facie case because there was no available position or the position was never filled.[6]/ Therefore, plaintiff's complaint cannot survive.

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[4]/ See, e.g., Pl.'s Statement ¶¶ 10-13.

[5]/ See, e.g., Pl.'s Statement ¶¶ 11-14.

[6]/ Given the conclusion that the eight positions which remain at issue in this suit were either covered by plaintiff's Release, not available, or never filled, the Court need not decide whether plaintiff was qualified for the

II. DCHRA Claims

As apparently conceded by the plaintiff, his discrimination and retaliation claims under the DCHRA are time-barred. As noted by this Court in its Order of November 9, 2000, plaintiff admitted that his DCHRA claim was time-barred as to defendant Brendsel. (Opinion, November 9, 2000, at 3 n.3.) That concession necessarily applies with equal force to any DCHRA claims against defendants Freddie Mac and Delk. Claims of discrimination or retaliation brought under the DCHRA must be brought within one year of "the unlawful discriminatory act, or the discovery thereof." D.C. Code § 2-1403.16(a); see also Paul v. Howard Univ., 754 A.2d 297, 311-12 (D.C. 2000). Because plaintiff filed suit on his DCHRA claims on June 3, 1998, his DCHRA claims will be time-barred if the discriminatory or retaliatory conduct took place before June 3, 1997. Plaintiff claimed a violation of the DCHRA with respect to refusal to hire for the positions of Director, Industry Relations and Director, Government Relations, both of which occurred on February 6, 1996. Such claims are obviously time-barred.

III. 1996 Release

Defendants are entitled to summary judgment on plaintiff's refusal to hire claims that rose before April 7,

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position. As a result, much of defendants' evidence, which plaintiff does purport to dispute, will not be addressed herein.

1996, the effective date of the Release executed by plaintiff on March 31, 1996.

Under Virginia law, which governs by virtue of Paragraph 11 of the Release, a release is viewed as an ordinary contract, and its scope is governed by the parties' intent as expressed in the language of the release. See Berczek v. Erie Ins. Group, 529 S.E.2d 89, 91 (Va. 2000). See id.; see also Richfood, Inc. v Jennings, 499 S.E.2d 272, 275 (Va. 1998). Neither party disputes the validity of the Release; thus this Court must enforce its plain language. See Great Falls Hardware Co. of Reston v. South Lakes Village Center Associates, Ltd. P'ship, 380 S.E.2d 642, 643-44 (Va. 1989).

The language of the Release is clear and unambiguous and applies broadly to one "known or unknown" "claims of one nature," including "claims arising out of or relating in any way to [plaintiff'] employment relationship" and "claims involving any damages or continuing or future effects arising out of or resulting from any actions or practices which to place or arose prior to the date of this Release of Claims." Under Virginia law, this form of general release is enforceable whether plaintiff knew that he would be or had been injured by acts taken before its effective date. See Virginia Impression Prods. Co. v. SCM Corp., 448 F.2d 262,265 (4th Cir. 1971). In any case, it is not disputed that the broad language of the Release covers all discrimination and retaliation claims arising prior to its effective date.

Under federal law, plaintiff's decision to waive federal discrimination and retaliation claims will be enforceable if the decision was knowing and voluntary. See Alexandria v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974); see also Somervell v. Baxter Healthcare Corp., 966 F. Supp. 18 (D.D.C. 1997), *reversed on other grounds*, 159 F.3d. 637 (D.C. Cir. 1998); Samman v. Wharton Econometric Forecasting Associates, Inc., 577 F. Supp. 934, 934-35 (D.D.C. 1984) (voluntary settlement of disputes favored in Title VII cases). In this case, plaintiff does not contest the validity of the Release.

Nonetheless, plaintiff raises two arguments in an attempt to escape the all-encompassing language of the Release. Neither is persuasive. First, he claims not have known that he had been denied a number of positions at Freddie Mac before the effective date of the Release. (E.g., Pl.'s Opp. at 38.) However, even if his claims were not precluded by the clear language of the Release, it is, as a factual matter, refuted by plaintiff's own deposition testimony. Thus, no reasonable jury could find that plaintiff was unaware of his nonselection.

With respect to two of the positions – Director, Industry Relations and Director, Government Relations – Morgan admits that he had lunch with Mitchell Delk on February 6, 1996, and at this lunch, they discussed both of these jobs. (Pl.'s Decl. ¶ 16; Defs.' Statement ¶ 30.) However, as conceded by plaintiff, Delk told him that "he planned to 'reserve' the Director, Industry Relations position for one of his current directors;" and that as for the Director, Government Relations position, which was

not vacant at the time, Delk "rejected" plaintiff's assertions that he was qualified by virtue of his Senate work, since "he was looking for someone with Republican House Committee experience" and he "suggested . . . [that Morgan] apply for a comparable position outside of Freddie Mac." (Pl.'s Decl. ¶¶ 16-17.) Since plaintiff does not dispute these facts, its is irrelevant that he wrote to Delk on February 28, to "express. . . [his] interest in the Director of Industry Relations or one other potential opportunities in the department."[7]/ (Pl. Opp., Exh. L; see also Pl.'s Opp. at 7-8.) Obviously, an expression of continued interest by Morgan does not negate the fact that he was told at lunch that he would never get either position,[8]/ and that he should look for a comparable private sector job. (Defs.' Statement ¶¶ 34, 42, 46; Pl.'s Dep. at 548-49, 561-63.)[9]/ Thus, any claim relating to these position by signing the Release.

Similarly, the Release bars plaintiff's claim regarding the Director, Product Development/ Business Management (1996) position. In February 1996, plaintiff

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[7]/ Moreover, as discussed at p. 16-17, infra, the Director, Industry Relations position was never filled and there was no vacancy with respect to the Director, Government Relations, so plaintiff cannot, as a matter of law, prevail on either claim even in the absence of the Release.

[8]/ Plaintiff admits that Gibbons also insisted that his ""personality' would not fit in the department." (Pl.'s Opp. at 7.)

[9]/ In his DCHRA Discrimination Complaint, filed on January 10, 1997, plaintiff claimed that the discriminatory conduct with respect to his nonselection for these positions occurred on February 6, 1996. (See Pl. Dep., Exh. 45.)

approached James Cotton, Vice President, Marketing, regarding this position. (Defs.' Statement ¶ 60; Pl.s Dep. at 785-86; Cotton Dep. at 9-10.) Mr. Cotton accelerated the recruitment process and interviewed plaintiff. In the end, however, after deciding that plaintiff was not qualified, Mr. Cotton informed plaintiff that he was not the top candidate. (Defs.' Statement ¶¶ 63-67) Whether he was qualified for the position is irrelevant, since plaintiff admits that he knew that he was not the top candidate prior to executing the Release.[10]/ (Defs.' Statement ¶ 68; Pl.'s Dep. at 799-802, 832-35.) Moreover, plaintiff acknowledges that at the time, he interviewed his nonselection as having been motivated by race discrimination. (Pl.'s Dep. at 802.) Plaintiff offers no evidence to suggest that defendant's decision was open for reconsideration or was in fact reconsidered. Thus, the Release bars any claim arising from this refusal to hire.

Finally, the Release bars plaintiff's claim regarding the Director, Securities Marketing (1996) position. In his deposition (Pl.'s Dep. at 929), and in his Declaration (¶ 23), plaintiff admits that in March 1996, he interviewed with Robert Ryan and Roy Redlingshafer for this position, and that both "claimed that . . . [he] lacked the industry contacts to do an effective job." Further, Morgan concedes that he understood at the time that Redlingschafer did not think that he was qualified for the

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[10]/ Again, plaintiff's follow-up communications in which he expressed continuing interest in the position do not establish a triable issue of fact. In fact, after refusing to hire plaintiff, Cotton did not consider him further for the position. (Cotton Dep. at 28-29, 87-89.)

position. (Pl.'s Dep. at 928-29.) Despite these admissions, plaintiff attempts to argue that he was not informed that he would not be considered for the job during the March 1996 interview. (Pl.'s Statement ¶ 16.) Obviously, by being told that he lacked the necessary qualifications, Morgan had to know that he could not get the job and it would be purely superfluous for Redlingschafer and Ryan to provide specific notification to Morgan that he would not be considered for the position. Thus, even if plaintiff had not been explicitly told that he would not get the job, he knew that management thought he lacked the requisite skills, experience, and contacts. (Pl.'s Dep. at 928.) Therefore, a reasonable jury could only conclude that plaintiff was on notice of his rejection prior to signing the Release.[11/]

Second, plaintiff argues, without any legal support, that the Release does not apply to the four nonselections discussed above, because the allegedly discriminatory conduct did not occur until the position were filled by another applicant, which occurred, according to plaintiff, after he signed the Release. (E.g., Pl.'s Opp. at 33) Obviously, such an argument is flatly inconsistent with plain language of the Release and must be rejected for that reason alone. But moreover, even if plaintiff were factually correct in his argument that each of the positions

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[11/] This claim would also be encompassed by the Release's broad language which covered "unknown" claims where the "effect" appeared after execution of the Release but arose from a decision made prior to the execution. See Virginia Impression Prods., 488 F.2d at 265.

was filled after the date of the Release, which he is not,[12]/ the Release bars suit regardless of when the position might have been filled, since his claims would have accrued when he was told that he would not be hired, not when someone else was selected for the position. See Delaware State College v. Ricks, 449 U.S. 250, 256-58 (1980) (discrimination complaint arose when plaintiff denied tenure, not when employment finally terminated); see also Harris v. Ladner, 127 F.3d. 1121, 1124 (D.C. Cir. 1997) (holding that statue of limitations commences when final decision made and communicated to plaintiff); Thompson v. Capitol Police Bd., 120 F. Supp. 2d 78, 82 (D.D.C. 2000) ("[T]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful.") (citation omitted).

In sum, plaintiff released defendants from "known and unknown" "claims arising out of or relating in any way to [plaintiff's] employment relationship," including "continuing or future effects that resulted from "actions . . . which took place . . . prior to the date of this Release." As discussed above, the language of this Release forecloses plaintiff's claim as to four positions even if he did not know that he would be injured by conduct occurring before its effective date. See Virginia Impression Prods., 448 F.2d. at 265. Plaintiff was well aware of the rejections prior to the signing of the Release, and its is of no legal significance that the position may have been filled after the date of the Release. Thus, with

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[12]/ See discussion at pp. 16-17, infra.

respect to each of the four positions discussed above, because each refusal to hire took place before April 7, 1996, plaintiff surrendered those claims when he chose to execute the Release.

IV. Discrimination

Plaintiff contends that defendants' refusal to hire him for a number of positions constitutes unlawful discrimination under Title VII and Section 1981. However, because plaintiff has failed to make out his prima facie case of discrimination under the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), summary judgment for defendants is appropriate on all these claims.

To establish a prima facie case of racial or political discrimination based on a refusal to hire, plaintiff must show that (1) he belongs to a protected class and that employment decision-makers were aware of this; (2) that he applied and was qualified for *an available position*; (3) that he was rejected despite his qualifications; and (4) that a similarly situated individual outside of his protected class filled the position or the *position remained vacant and the employer continue to seek applicants.* See Cones v. Shalala 199 F.3d. 512, 516 (D.C. Cir. 2000) (emphasis added). The prima facie test is a flexible one that may be adjusted to the facts of the case at hand, guided by the necessity of showing that the employment action taken ""under circumstances which gives rise to an inference of discrimination."" Harding v. Gray, 9 F.3d. 150, 152 (D.C. Cir 1993) (quoting Texas Dep't of Community Affairs v.

Burdine, 450 U.S. 248, 253 (1981)). Even under this flexible standard, plaintiff cannot establish a prima facie case with respect to any of his refusal to hire claims, for he cannot show that the positions he applied were either available or were not cancelled.[13]/

As is clear, there must be an available position. See Cones, 199 F.3d. at 516 (plaintiff must demonstrate at least that his rejection did not result from one of the two most common legitimate reasons for which an employer might reject a job applicant: "'an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.'") (quoting International Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977)); accord Carter v. Pena, 14 F. Supp. 2d 1, 6 (D.D.C. 1997); see also Bishopp v. District of Columbia, 57 F.3d 1088, 1092-93 (D.C. Cir. 1995) ("no damages available for hypothetical failure to fill [] position [that] . . . was never opened"). Absent a vacancy, plaintiff simply cannot argue that he was the victim of discrimination. See Cones, 199 F.3d. at 516.

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[13]/ Plaintiff peppers his brief with unrelated instances of discriminatory misconduct at Freddie Mac and an extensive discussion of his qualifications for the positions in question. (See, e.g., Pl.'s Opp. at 11, 16-17.) However, even if plaintiff could prove the superiority of his qualifications or incidents of racial hostility, this evidence does not fill the gaps in his prima facie case. Because plaintiff cannot establish a prima facie case for reasons unrelated to his qualifications, the Court need not address the issue of relative qualifications or evidence relating to the question of pretext under the McDonnell Douglas burden-shifting analysis. See Cones, 199 F.3d at 516.

The undisputed evidence demonstrates that there was no vacancy for the position Director, Business Support. Plaintiff sent a letter of interest regarding the position dated July 3, 1997. (Morgan Dep., Ex. 64.) However, Freddie Mac's search to fill the position had been suspended in June 1997, and plaintiff was informed of this fact. (Defs.' Statement ¶¶ 143, 146.)

In response, plaintiff attempts to argue that Freddie Mac did not suspend hiring for the position, but instead renamed it Director, Strategic Planning, and interviewed Ann Herington for the job sometime in the Fall of 1997. (Pl.'s Opp. at 32.) However, plaintiff's unsupported conjecture that the position was renamed does not create a genuine issue for trail. Plaintiff offers no evidence that the positions we in fact similar or the same except to note that the title of one position – "Strategic Planning" – was also one of the responsibilities of the Business Support position. Plaintiff cites to ten pages of Ann Herington's transcript, which establish only that Herington was interviewed in the Fall of 1997 and was hired for the Strategic Planning position. (See Pl.'s Statement ¶ 17.) The fact that Herington interviewed in the Fall of 1997 is not even close enough in time to plaintiff's July application to raise an inference that the positions were one and the same. Moreover, defendants provide the Declaration of Cheryl Clarke, the Director, Human Resources at Freddie Mac in 1997, in which she avers that the position was not open when plaintiff applied and that it was ultimately eliminated. (Clarke Decl. ¶¶ 5-7.) Given this undisputed evidence, no reasonable jury could find that the positions were identical based solely on

plaintiff's self-serving comparison of one duty of the Business Support position and the *title* of the Strategic Planning position. Clearly, "neither the nonmovant's conjecture and surmise nor mere 'conclusory allegations of discrimination, without more' are sufficient to defeat a motion for summary judgment." Carney v. American Univ., 960 F. Supp. 436, 439 (D.D.C. 1997) (quoting Grigsby v. Reynolds Metals Co., 821 F.2d 590, 597 (11th Cir. 1987)), *aff'd in part, rev'd in part,* 151 F.3d 1090 (D.C. Cir. 1998).

The position of Director, Issues Management (1997) was also filled before plaintiff applied. In June 1997 verbal offers were made by Ann Schnare to two applicants, Ellen Roche and Susan Gates, and both were hired before the plaintiff had even applied on July 7, 1997. (Defs.' Statement ¶ 172.)

Plaintiff baldly disputes this evidence without one competent proof. Instead, he points to a number of documents, none of which controverts the undisputed evidence of a June offer date. First, plaintiff offers "Personnel Administration Forms" that provide an "effective date" for Ellen Roche of July 16, 1997, and for Susan Gates of August 25 and September 16, 1997. (Pl.'s Opp., Ex DD.) Plaintiff makes no attempt to explain the significance of these documents, except to argue that they do not support defendants' claim of a June offer date. (Pl.'s Opp. at 27-28.) In one case, the "effective date[s]" are entirely consistent with a June offer and do nothing to assist the plaintiff's argument. Second, plaintiff offers a letter dated July 14, 1997, confirming the offer to and

acceptance of the position by Ellen Roche. (Id.) Again, the July confirmation letter is entirely consistent with a June offer. In short, these documents do not create an issue of fact regarding the availability of these position in the face of sworn testimony of Ann Schnare, who hired th people who filled the position.[14]/

Similarly, plaintiff cannot establish a prima facie case regarding two positions that are covered by the Release – Director, Industry Relations (1996) and Director, Government Relations (1996). With respect to the Director, Industry Relations position, defendant Delk was not recruiting for the position at the time plaintiff expressed interest in the position. (Defs.' Statement ¶ 35; Morgan Dep. at 541, 560.) The position was never filled by Delk, but was eliminated altogether from his department. (Defs'. Statement ¶ 36.) Plaintiff does not dispute that Delk never filled the position; rather, he

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[14]/ Plaintiff also argues that Freddie Mac advertised for one position, filled it with two people, and actually intended to fill it with "several." (Pl.'s Opp. at 28-29.) On this basis, plaintiff would have this Court infer that defendants' asserted justification for nonselection – that there was no vacancy – was pretextual. However, plaintiff offers no evidence to support his naked assertions that Freddie Mac intended to hire several person for the position. Even if multiple hires were intended, plaintiff offer no evidence that the hiring process had not been completed by June 1997. Unlike the case plaintiff cites, defendants have not been caught in an outright lie. See e.g., Bahardi v. Domino's Pizza, 873 F. Supp. 1528, 1535 (M.D. Ala. 1995) (plaintiff informed that there was no vacancy but wife offered employment over the phone soon thereafter.) Given the absence of one competent evidence of a third vacancy, plaintiff cannot ask a jury to infer that the defendant was planning in July to hire additional persons for this position.

contends that the functions of the position were transferred to another department and filled one year late with the hire of Jim Park. (Pl.'s Opp at 34-35.) While plaintiff appears to dispute defendants' claim that Jim Park did not fill the position of Director, Industry Relations, (Pl.'s Statement ¶ 6), he does not dispute that Park was never hired by or worked for Delk and that Park was hired by Schnare in March 1997 as Director, Business Support I, in the Corporation Relations Division. (Defs'. Statement ¶ ¶ 38-39.) Plaintiff also relies on Exhibit JJ and KK (Pls'. Statement ¶ 6), but neither of these documents raises an issue of fact as to this position, since neither makes reference to an Industry Relations position or to "Jim Park." Thus, as ruled by Magistrate Judge Facciola after reviewing all the relevant documents, Park's hire has no relevance to plaintiff's claim regarding his nonselection for the position of Director, Industry Relations, for Park never served in that position and was Director, Business Support. See Memorandum Order Issued by Magistrate Judge John Facciola on June 21, 2001, at 3.

With respect to the Director, Government Relations position, plaintiff does not contend that the position was open when he expressed interest in it. (Pls'. Statement ¶ 7; Defs'. Statement ¶ 42.) Furthermore, plaintiff cannot establish that the position was ever available prior to filing a lawsuit. (Defs'. Statement ¶ 41.) Therefore, plaintiff cannot show that there was an available vacancy and this claim must fail for this reason, as well as because of the Release.

Plaintiff fares no better with respect to the remaining positions because he cannot establish that defendants ever filled the positions for which he applied. See Carter, 14 F. Supp. 2d at 6 (no prima facie case when vacancy announcement cancelled and job was never filled); Jones v. Tanoue, 131 F. Supp. 2d 220, 222 (no prima facie case when position was cancelled and never filled); Newbury v. National Press Club, Inc., 1997 WL 664589 at *3 (D.D.C. August 26, 1997) (no prima facie case when position eliminated). With respect to the Director, Business Strategies (1997) position, it is undisputed that the position was never filled and was in fact eliminated in July 1997. (Defs'. Statement ¶ 164.) While plaintiff claims that Freddie Mac offered the position to another individual based on a Freddie Mac document indicating that the position was "to be offered to P. Mahoney,"[15/] (Pl.'s Opp., Ex. JJ.), this document does not establish that an offer was made. But more importantly, plaintiff offers nothing to dispute defendant's evidence that the position was never filled, but was ultimately cancelled.[16/] Because plaintiff was not rejected in favor of another candidate

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[15/] Plaintiff also claims that the position was open to outside candidates, defendants' assertion to the contrary notwithstanding. (Pl.'s Opp. at 41.) However, because plaintiff cannot establish his prima facie case, both parties' evidence regarding whether the position was open to external candidates is irrelevant.

[16/] Defendants assert, citing deposition testimony of three employees, that "Delk hired no one for the position and eliminated it from his department on July 31, 1997." (Defs'. Statement ¶ 164.) In a totally nonresponsive statement, plaintiff claims that "[i]t is disputed that the position Director, Business Strategies was not offered to anyone . . . The position was offered to Peter Mahoney in July 1997." (Pl.'s. Statement ¶ 19.)

who filled the position, a prima facie case cannot be made.

Similarly, the Director, Issues Management (1998) position was never filled and ultimately cancelled in March 1998 by Dwight Robinson, an African-American who assumed the new position of Vice President, Industry Relations and Issue Management. (Defs'. Statement ¶¶ 207-210; Schnare Dep. at 96, 98-99, 106-108.) While plaintiff does not dispute this statement, he appears to be arguing that this position was offered non-competitively to Anne Herington at the end of 1997. (Pl.'s Opp. at 25-26.) First, any offer to Herington is irrelevant as it is not disputed that this position was not filled and was ultimately cancelled. (Defs'. Statement ¶ 210.) Second, plaintiff conflates a number of issues management positions. In fact, plaintiff did not apply for the position before it was offered to Herington. As discussed above, plaintiff applied for an earlier position (*i.e.*, Director Issues, Management (1997)) in July 1997, but it was already filled by Ellen Roche and Susan Gates. Herington submitted an application in July but understood that no position was then available, so she was not considered for the job. (Defs'. Statement ¶ 176; Schnare Dep. at 54-56; Herington Dep. at 16-17, 20-26.) As previously discussed, the absence of any vacancy alone is sufficient to defeat plaintiff's claim. See Carter, 14 F. Supp. 2d at 6; see also Rush v. McDonalds Corp., 760 F. Supp. 1349, 1362 (S.D. Ind. 1991).

When a second Director, Issues Management position (also referred to as Director, Issues Management (1998))

opened late in 1997, defendants were unaware of plaintiff's interest in the new position. (Schnare Dep. at 61-62.) Without having applied, plaintiff cannot establish a prima facie case of discriminatory nonselection. See Cones, 199 F.3d. at 516. Moreover, even if plaintiff had applied for this position, it is undisputed that it was never filled and ultimately it was cancelled. (Defs'. Statement ¶ 210.) When Herington was interviewing at Freddie Mac for another position, Schnare learned of her interest and interviewed her for the Issues Management position as a replacement hire in late 1997; Herington was offered the job, but declined the position. (Id. ¶¶ 205-206.) Subsequently, the position was posted publicly and plaintiff had an opportunity to apply in January 1998. (Id. ¶¶ 207-208.) This vacancy, however, was never filled and the position was split into two manager-level positions. (Id. ¶ 210.) Therefore, plaintiff's claims as to this position must fail.[17/]

In sum, as to at least six position, plaintiff cannot make out a prima facie case. Accordingly, defendants are entitled to summary judgment as to these claims.

V. Retaliation

[17/] The cases plaintiff relies upon do not establish that the offer of a position to Herington is by itself sufficient to satisfy plaintiff's initial burden. See Cones, 199 F.3d at 517 (later transfer who filled position was sufficient to make out a prima facie case on claim of discriminatory non-promotion); Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1436 (D.C. Cir. 1997) (prima facie case requires proof that position was filled).

Finally, plaintiff contends that defendants retaliated against him in violation of Title VII with respect to the five positions that he did not get hired for after he filed his EEOC charge on December 11, 1996.[18]/ To establish a prima facie case of retaliation under Title VII, plaintiff must show, *inter alia*, an "adverse employment action." Brown v. Brody, 199 F.3d. 446, 452 (D.C. Cir 1999). However, there can be no finding of an adverse action if there was no vacancy at the time plaintiff applied or the position was never filled. See International Bhd. of Teamsters, 431 U.S. at 358 n.44 (McDonnell Douglas "demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from . . .the absence of a vacancy in the job sought."); Macellaro v. Goldman, 643 F2d 813, 816 (D.C. Cir. 1980) (withdrawal of position that was never filled did not harm plaintiff). As shown at pp. 13-20, supra, as to each of the five positions that plaintiff applied for after December 11, 1996, it is undisputed that there was no vacancy or the position was

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[18]/ These positions included: Director, Business Support (1997), Director, Business Strategies (1997), Director, Issues Management (1997), and Director, Issue Management (1998). Plaintiff also alleges retaliation with respect to the position Director, Government Relations (1996). As noted above, plaintiff was informed on February 6, 1996, that he would not be considered for this position; thus, plaintiff's claim is unambiguously barred by the Release. Furthermore, the refusal to hire occurred well before plaintiff filed his EEOC charge, making it impossible for plaintiff to establish a causal connection between the non-selection and his discrimination complaint. See Hazward v. Runyon, 14 F. Supp. 2d 120, 124-25 (D.D.C. 1998) (not possible to establish causal connection between discrimination complaint and employer action antedating that complaint).

never filled. Therefore, plaintiff's retaliation claim must also be dismissed.

CONCLUSION

For all of the above reasons, Defendants' Motion for Summary Judgment is granted. A separate order will accompany this opinion.

ELLEN SEGAL HUEVELLE
United States District Judge

Dated:

APPENDIX A3: Equal Employment Opportunity Commission, Letter of DETERMINATION, issued August 14, 1998

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1400 L STREET, N.W. SUITE 200
WASHINGTON, D.C. 20005

Filed August 14, 1998

Charge Number: 100 97 0123

Mr. Tony Morgan, et. al.
108 14th St., S.E.
Washington, DC 20003

Charging Parties

vs.

FREDDIE MAC, et. al.
8200 Jones Branch Drive
McLean, VA 22102

Respondents

DETERMINATION

On behalf of the Commission, I issue the following determination on the merits of the subject charge. All requirements for coverage are met.

Charging Party alleges that Respondent has violated and continues to violate Title VII of the Civil Rights Act of 1964,

as amended by unlawfully discriminating against him and Black employees on the basis of race.

Specifically, Charging Party alleges that Respondent's discriminatory practices include, but are not limited to discriminating against Black employees with respect to: Hostile Work Environment; Retaliation; Promotion; Reassignment; Wages; Bonuses; Termination; Hiring; Steering; Demotion; and Initial Job Assignment.

Respondent denies Charging Party's allegations.

Examination of the evidence reveals that Respondent's disregard for the civil rights of black employees has resulted in a hostile work environment. Examination of the evidence reveals that racially offensive "jokes" were and continue to be disseminated to Respondent's employees via Respondent's E-mail system. Moreover, the word "Nigger" continues to be written on walls with Respondent's facility. When Black employees complain of these acts of discriminatory treatment, they are subjected to "hate" messages and consequently identified as the perpetrator of the discriminatory act.

Concerning Retaliation, the evidence reveals that Respondents retaliates against all employees that protest employment discrimination. These acts of retaliation include, but are limited to, constructive discharge, Respondent ostracizing the employee that protested the act of discrimination, Respondent's refusal to honor its "confidentiality" provision while investigating allegations of employment discrimination, and reassignment.

Anecdotal evidence also reveals that Respondent failed to promote and adequately issue bonuses to Black employees who receive "above plan" annual performance ratings. Respondent consistently applies subjective criteria when determining promotions and bonuses for Black employees. Qualified Black employees rarely receive promotions and bonuses when deserved. These employees often receive reassignments in lieu of promotions. Respondent's failure to promote and issue bonuses to Black employees has adversely affected the average annual salaries of Black employees [.]

Furthermore, Respondent's hiring practices are not reflective of the industry's hiring practices. Examination of the record reveals that Black employees are underrepresented in Professional, Office and Clerical, and Managerial positions at Respondent. This underrepresentation is also a result of Respondent's practice of steering Black employees to particular positions and departments. Moreover, Black employees are terminated more frequently than their white co-workers. These terminations include constructive discharge and layoffs.

Respondent's discriminatory environment is the result of a lack of interest in promoting equal opportunity among Black employees. Leland Brendsal, CEO, has yet to take a definitive stand to correct race discrimination despite having knowledge of these discriminatory acts. Furthermore, Respondent's Human Resources Division, led by Candice Mendenhall does not react appropriately and/or effectively when complaints of employment discrimination are filed. Consequently, Human Resources spends an inordinate

amount of time attempting to "cover up" Respondent's discriminatory environment.

Neither Leland Brendsal nor Candice Mendenhall acknowledge that race discrimination exists. This denial has prevented Respondent from formulating and implementing a significant remedial course of action.

The totality of the evidence reveals that **Charging Party and a class of employees** were discriminated against in that they were subjected to race discrimination and retaliation against in regards to the terms and conditions of their employment because they protested acts of employment discrimination.

An adverse inference has also been drawn by the Commission concerning the aforementioned allegations. Several Black employees assert that they confided in Mr. Keith Earley regarding these acts of employment discrimination. These employees confided in Mr. Earley because of his race (Black) and in that he is employed in a supervisory capacity at Respondent, not because he is a member of Respondent's legal counsel. After the Commission subpoenaed Mr. Earley and denied Respondent's "Petition to Revoke or Modify Subpoenas", Respondent failed to produce Mr. Earley for an interview. Respondent's reasoning for not producing Mr. Earley was that Mr. Earley's testimony would violate Respondent's attorney-client privilege. The Commission explained to Respondent that Mr. Earley was required to testify as a witness, not as an attorney for Respondent. Since Respondent did not produce Mr. Earley, the Commission has inferred that witness testimonies concerning Mr. Earley are true and accurate.

The Commission makes no finding to the allegations of demotion and initial job assignments.

Based on the preceding analysis, I have determined that the evidence obtained during the investigation establishes that Respondent violated Title VII of the Civil Rights Act of 1964, as a result of the opinion issued in this action.

If the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violation have occurred, the Commission now invites the parties to join with it in an collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with section 1601.26 of the Commission's Procedural Regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason, is unable to secure settlement acceptable to the office Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the charging party, aggrieved persons, and the Commission.

Respondent is reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in

Commission investigations is also prohibited. These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission:

Aug 12 1998
Date

Tulio L. Diaz, Jr.
Director